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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF ON BEHALF OF ROBERT PAGE WRIGHT.

WILLIAM LEMKE,
S. S. LAMBETH, JR.,
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Opinion Below.

Robert Page Wright *vs.* Vinton Branch of the Mountain Trust Bank of Roanoke, Virginia, and A. C. Harris, Trustee. Order to dismiss without opinion (D. C., W. D. Va.) [R. 10-11]. Opinion of Circuit Court of Appeals of 4th Circuit, 85 F. (2d) 973 (C. C. A. 4th) [R. 16-22].

Jurisdiction.

Certiorari was granted on December 21, 1936, under Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925.

Question Presented.

The only question presented is the constitutionality of subsection (s), known as the Frazier-Lemke Act of August 28, 1935 [49 Stat. 942], 11 U. S. C. Supp. 1, 203 (s), which was added as an amendment to Section 75 of the Bankruptcy Act [47 Stat. 1470] after the Supreme Court held the original Frazier-Lemke Act of June 28, 1934 [48 Stat. 1289] unconstitutional.

The sole question here involved is whether the new subsection (s) is in violation of the "due process" clause of the Fifth Amendment. This new subsection (s) was enacted by Congress with a view of complying with the provisions set forth in the Supreme Court's opinion holding the old subsection (s) unconstitutional. We feel that the new subsection (s) conforms to the opinion of the Supreme Court and is constitutional.

Summary of Argument.

I. The new Frazier-Lemke Act is an Act of Congress based on Congress' constitutional power to enact laws on the subject of bankruptcies. It is the result of a painstaking attempt by Congress to comply with the decision of this Court holding the first Frazier-Lemke Act unconstitutional.

II. The new Frazier-Lemke Act has made careful provision for the protection of all property rights of creditors. In no respect does it go beyond the boundaries already marked out as being within due process of law. In most respects the new Act is not nearly so drastic as Sections 77 and 77b of the Bankruptcy Act.

III. The new Frazier-Lemke Act is a reasonable exertion of a power expressly delegated to the Congress of the United States. This power is one granted exclusively to Congress. Any legislation enacted under this power there-

fore overrides all conflicting state laws and even state constitutions.

IV. When exercising the bankruptcy power Congress may make provision for rehabilitation of the debtor as well as for protection of creditors. It may stay court proceedings for a reasonable period. It may permit the bankrupt to remain in possession during the stay. It may allow the bankrupt to repurchase the property involved.

Statute Involved.

The statute involved is set forth in Appendix A (p. 76, *infra*).

On March 3, 1933, Section 75 of the Bankruptcy Act entitled "Agricultural Compositions and Extensions" was enacted. On June 28, 1934 Section 75 was amended by the addition of the Frazier-Lemke Act [Section 75 (s)]. This act was held unconstitutional by this Court. On August 28, 1935, the new subsection (s), here in question, was enacted.

Differences Between Old and New Acts.

While the new subsection (s) has for its object and purpose the conservation and preservation of agriculture, the same as the old subsection (s), yet the methods and means employed are essentially different. The old act provided for a private sale of the security direct to the mortgagor. The present act provides for a judicial public sale at which the mortgage holder may bid.

The old subsection (s) gave an extension of time of five years. The new Act gives an extension of time of three years.

The old subsection (s) created a general lien subject to and inferior to all prior liens or encumbrances. The new subsection (s) expressly provides that all existing mortgages, liens and encumbrances shall remain in full force

and effect and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the claims of the secured creditors as their interests may appear.

The old Act provided for a sale by the trustee to the debtor of any part or all of the remainder of the bankrupt's estate after exemptions had been set aside upon payment of 1 per centum interest upon the appraised price within one year from the date of said sale and 2½ per centum of the appraised price for each of the next two years and 5 per centum of the appraised price for the following two years and the balance of the appraised price within six years, interest at the rate of 1 per centum. The new subsection (s) has no such provisions.

The old subsection (s) makes provisions for the debtor to dispose of part or parcel of his property. The new subsection (s) makes no such provision.

The old subsection (s) placed possession of the property in the farmer debtor under the control of the court. The new subsection (s) places the property in the custody and under the supervision and control of the court. *Under it the farmer debtor retains possession only as long as he complies with the orders of the court.*

Under the new subsection (s) the farmer debtor is entitled to retain possession, under the custody, control and supervision of the court, *as long as he complies with all the orders of the court and pays a reasonable rental, semi-annually, fixed by the court.* The first payment must be made within a year. The old subsection (s) contained no such provision.

The new subsection (s) provides further that the court, *if it deems it necessary to protect the creditors from loss and to conserve the property, may order sold, at public or private sale, any unexempt perishable property of the debtor or any unexempt personal property not reasonably neces-*

sary for farming operations. The old subsection (s) contained no such provision.

Again, under the new subsection (s) the court may, in addition to the rental, *require payments on the principal due and owing by the debtor to the secured or unsecured creditors and may order such payments to be made quarterly, semi-annually or annually.* The old subsection (s) contained no such provision.

Under the old subsection (s) the value of the property was fixed by appraisal. Under the new subsection (s) it is fixed by appraisal with the right of any creditor *to ask for re-appraisement or to ask that it be sold at public auction.*

Under the old subsection (s) there was no public sale and no provision under which the secured creditors could bid or buy the property. Under the new subsection (s) the secured creditor *may demand a public sale and bid at such sale and buy the property* providing he is the highest bidder. (48 Stat. 1289) and (49 Stat. 942).

It will be noted that the new law makes the following provisions for the protection of the creditor's interest:

1. The creditor may appeal from the appraisal.

2. Liens are preserved in full force and effect.

3. The property remaining in possession of the debtor is in the custody and under the supervision of the court.

4. The debtor must pay a reasonable rent semi-annually.

5. This rental is used to pay taxes and upkeep on the property.

6. The court may order perishable property or property not needed in farming sold.

7. The court may require payments on principal to be applied on the secured debt. The payment may be required quarterly, semi-annually, or annually.

8. The creditor may have a re-appraisal.

9. The creditor may have a judicial sale.

10. The creditor may bid at the sale.

11. If the debtor fails to comply with any provisions of the Act or any court order made thereunder or is unable to refinance himself, a trustee may be appointed and the property sold.

Statement of the Case.

This case is one of six cases brought under subsection (s) of Section 75 of the Bankruptcy Act (49 Stat. 942) known as the new Frazier-Lemke Act (R. 1 and 2).

The case was referred to the Conciliation Commissioner. A meeting of the creditors was called at which the debtor made a written proposal for extension of the time for payment of his debts, specially asking time for the marketing of valuable boxwood on his premises (R. 4, 5 and 6).

The Conciliation Commissioner reported to the District Court that the creditors declined to accept the debtor's proposal for extension and the learned District Court entered an order providing that the proceedings should be dismissed unless within fifteen days the debtor should file his petition praying to be adjudged a bankrupt under Section 75, Subsection (s), as amended by the Act of August 28, 1935 (R. 7 and 8).

Petitioner filed his amended petition under said last mentioned section, praying to be adjudged a bankrupt, and praying that he might have all the benefits of said section; and petitioner was by order of said District Court adjudged a bankrupt, and the case was referred back to the Conciliation Commissioner for proceedings under said Subsection (s) of Section 75 of the Bankruptcy Act, as amended (R. 8, 9 and 10).

The Vinton Branch of the Mountain Trust Bank having moved to dismiss the proceedings "upon the ground that

Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law," by order entered January 8, 1936, the motion was granted, and the proceedings were terminated (R. 10 and 11).

From this order petitioner was allowed an appeal by the United States Circuit Court of Appeals for the Fourth Circuit April 6, 1936 (R. 14), on assignment of errors duly filed (R. 11 and 12). The case having been argued, the learned United States Circuit Court of Appeals for the Fourth Circuit in an opinion (set forth in full, R. 16, *et seq.*) affirmed the learned District Court's judgment holding the said Act unconstitutional, and entered its order accordingly (R. 22).

The Circuit Court also entered an order that the mandate in this and the five other cases be stayed pending an application for Writ of Certiorari to the Supreme Court (R. 22 and 23).

Petition for writ of certiorari was duly filed November 16, 1936, and the writ granted on December 21, 1936 (R. 23).

Robert Page Wright, bankrupt petitioner, is fifty-two years of age. He is a resident of the County of Bedford, in the Western District of the State of Virginia, residing on his farm situated about one-half mile from the village known as Old Stewartsville. He is a farmer owning and operating, subject to liens, a tract of land containing about fifty-nine acres. He is married and his wife, Gertie F. Wright, resides with him on the farm. They have four children, three of whom are over twenty-one years of age. Two of the children reside with the petitioner, who for three years has been incapacitated for active work for the reason of invalidism—heart affliction.

Petitioner is unable to meet his debts as they mature. He believes his real estate would, under normal economic con-

ditions, be worth substantially more than the amount of his obligations, but under the existing conditions would bring substantially less than his obligations, and he is insolvent. Therefore, on March 29, 1935, he filed his petition for composition or an extension of time with the District Court, pursuant to the provisions of Section 75 of the Bankruptcy Act (R. 1 and 2).

Petitioner's obligations, on March 29, 1935, amounted to $6,559.50 of which amount $5,797.80 are secured claims. He also sets forth in his schedule his estimate of the value of his property. This amounts to $2,822.50 of which $2,500.00 is real estate (R. 3 and 4).

There has been no appraisal of petitioner's property for the reason that the creditors refused to accept the proposal for a composition. In the proposal the petitioner assures the creditors that he has no desire to avoid the payment of his debts in full and asks for the cooperation of his creditors and especially that the first lien creditors cooperate with him in disposing of boxwood to be applied on his indebtedness. But the creditors refused the proposal (R. 5-7). Thereafter proceedings were taken as set forth above and the case is now before this court for final determination on the constitutionality of the new Subsection (s) of Section 75 of the Bankruptcy Act.

Summary History of New Frazier-Lemke Act.

Realizing that this Court has been exhaustively informed in a number of recent cases as to the history and development of Bankruptcy in the United States, no attempt will be made to reproduce such material here. See *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555; *Ashton* v. *Cameron County*, 298 U. S. 513.

When the Supreme Court held the original Frazier-Lemke Act unconstitutional in *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555 (1935), the present act was introduced in both the Senate and the House. It was referred to the Judiciary Committees of the Senate and the House and both of these Committees referred it to Subcommittees for study and consideration with the purpose of complying with the court's decision.

The author of the bill was called in by both of the Subcommittees. The Act was then carefully considered sentence by sentence, section by section, with the decision of the Supreme Court so as to comply with that decision. Many changes were made by the Subcommittees.

After the Subcommittees had finished their work the bill was reintroduced with the changes and amendments made by the Subcommittees and then was brought up before the Committees of the Whole of both the Senate and the House. *There again the bill was gone over sentence by sentence, paragraph by paragraph and section by section, carefully considered and compared with the decision of the Supreme Court, and further amendments made.*

The bill was then brought up on the floor of the Senate and the House and further debated with a view of having it comply with the decision of the Supreme Court and was finally passed in its present form without a dissenting vote in either House. 49 Stat. 942, 11 U. S. C. 203 (s), Aug. 28, 1935.

The following quotations from the Congressional Record are indicative of the legislative discussion:

> Senator Copeland: "I wish to ask the Senator from Idaho (Sen. Borah): Is it his conviction that this bill in the form in which it is now presented to us is likely to run the gauntlet of the courts and to be declared valid legislation?"

Senator Borah: "It is my opinion that it will run the gauntlet of the courts. It is really nothing more now, if the senator please, than a bankruptcy bill. * * *"

Senator Copeland: "Did the senator take an opposite view regarding the original Frazier-Lemke Act?"

Senator Borah: "I opposed that measure here on the floor as the record will show."

Senator Copeland: "On constitutional grounds?"

Senator Borah: "For the reason that I thought it was unconstitutional." 79 Cong. Rec. 13662 (1935).

Senator Borah: "This bill undertakes to adapt the bankruptcy principles to the situation of the farmer. I venture to say that in principle the bill is no different than the acts under which multiple railroads have gone through bankruptcy, and where those creditors of whom the senator speaks have lost their 100 cents on the dollar. I see nothing in this bill which in principle has not been given to business, to municipal corporations and to all lines of industry." 79 Cong. Rec. 13637 (1935).

It is needless for us to suggest that a sincere attempt was made by the Judiciary Committees to have the act conform with the decision of the Supreme Court. There were eighteen lawyers on the Judiciary Committee of the Senate and twenty-six on the Committee of the House. Some of these lawyers have a national and international reputation. Some of them are among the leading constitutional lawyers of this nation.

Therefore, because of the importance of this case, because of the fact that it involves the right of Congress to legislate under a grant of power expressly given to it by the Constitution and because it involves the relative position of the judicial and legislative branches of our government, we feel the Court will bear with us, and give this case its most careful consideration.

We are not here concerned with the decision of the Supreme Court holding the original Frazier-Lemke Act un-

constitutional. This is not the same act, but a new act drafted carefully so as to comply with the mandate laid down by the Supreme Court in that decision. Although we may state in passing that while the decision of the Supreme Court was unanimous, *yet two United States Circuit Courts of Appeal, consisting of six judges, unanimously held it constitutional, and all but a few of the United States District Judges either accepted the Act as valid or gave oral or written opinions sustaining its constitutionality. The Attorney General's office, in an able and exhaustive opinion, also held it constitutional.* In addition we may state that some of our ablest constitutional lawyers agreed with our position that the original Frazier-Lemke Act was within the constitutional grant of power. From the above it is evident that there is dissenting legal and judicial opinion, even though the Supreme Court was unanimous. But, as stated above, this is not the original Frazier-Lemke Act. It is a new and entirely different Act.

Nothing Novel in Present Frazier-Lemke Amendment.

There is nothing unusual in the new Frazier-Lemke amendment. It simply applies well established principles of bankruptcy law to agriculture. This may appear novel, but there is no provision in the Frazier-Lemke amendment that the bankruptcy courts of this nation have not already made use of, in some cases.

The courts have allowed going concerns to remain in possession, and to continue in business under trustees, and without trustees. They have permitted possession and the payment of indebtedness of such concerns on the installment plan, with or without interest. *In re Reiman,* 7 Ben. 445, Fed. Cas. 11673; *Sparhawk* v. *Yerkes,* 142 U. S. 114; *In re Swofford Co.,* 180 Fed. 549; *Burlingham* v. *Crouse,* 228 U. S. 459.

The courts have scaled down indebtedness to less than the value of the property, through composition, and they have given extension of time in which payments were to be made; and this, at times, against the wishes of the minority. What can be done to a minority can be done to a majority, or all, secured or unsecured creditors, and still be constitutional. They have sold encumbered property, free of lien, and unencumbered property, for cash or on time. Referees in bankruptcy have sold encumbered and unencumbered property, at public and at private sales, at 75% of the appraised value without the approval of the court, and at less than 75% with the approval of the court; and on occasions, have sold it to the bankrupt. *In re Merkus*, 289 Fed. 732 (C. C. A. 2nd); *Traer* v. *Clews*, 115 U. S. 528.

"There is nothing new in selling mortgaged or encumbered property under the Bankruptcy Act. In fact, sales free of encumbrances were authorized by the statute of 1867. The present law has no such provision. The cases are quite uniform, however, in declaring that such sales can be authorized and by the referee as well as by the judge." *In re Waterloo Organ Co.*, 118 Fed. 904.

"The jurisdiction of the court does not depend upon the size of an estate or the size of a mortgage and a bankrupt, by making excessive mortgages, cannot defeat administration of his effects in bankruptcy." *Matter of Theiberg*, 47 Am. B. R. 257.

Again, "A clause in a mortgage giving the right to bid on bonds does not in any way limit the power of the court to order a sale free and clear from the mortgage lien, however much it may influence its discretion." *Matter of Franklin Brewing Co.*, 41 Am. B. R. 51.

"A sale of assets may be directed free of liens without regard to the objections of lienors provided such liens are amply protected by being transferred to the proceeds of the

sales." *Matter of Tube Co.*, 25 Am. B. R. 651. That is just what the Frazier-Lemke Act proposes to do. It proposes to wipe out the lien and to protect the lienholder by securing to him the proceeds of the sale.

"The effect of a sale, free of encumbrances, is to vest a purchaser with good title and to transfer all existing liens to the fund derived from the sale to which a lienholder must resort." *Shinn* v. *Kemp & Herbert et al.*, 73 Wash. 254, 131 Pac. 822.

"A bankruptcy court has power to sell a bankrupt's real property, free from encumbrances, and declare property liens to be liens on proceeds of sale, no matter whether liens are tax liens or not and such power is constitutional." *Van Huffel* v. *Harkelrode*, 284 U. S. 225.

The new Frazier-Lemke Act, Section 75(s) of the Bankruptcy Act of 1898, has been held constitutional in the following cases:

Dallas Joint Stock Land Bank v. *Davis* (5th Circuit, C. C. A.), May 5, 1936, paragraph 3999, Bankruptcy Law Service;

In re Loop, Western District, Pennsylvania, May 1, 1936, Bankruptcy Law Service, paragraph 4001;

In re Slaughter, Northern District, Texas, 12 Fed. Supp. 206, Bankruptcy Law Service, paragraph 3621;

In re Reichert, Western District, Kentucky, 13 Fed. Supp. 1, Bankruptcy Law Service, paragraph 3777;

In re Bennett, Western District, Missouri, 13 Fed. Supp. 353, Bankruptcy Law Service, paragraph 3814;

In re Cole, Southern District, Ohio, 13 Fed. Supp. 283, Bankruptcy Law Service, paragraph 3813;

In re Williams, Middle District, Tennessee, Bankruptcy Law Service, paragraph 3705;

In re Allison, Eastern District, Illinois, Bankruptcy Law Service, paragraph 3876;

In re McCune, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 3887;

In re Chilton, U. S. D. Ct., Colorado, Bankruptcy Law Service, paragraph 4185;

In re McIntyre, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 4365.

Former Decisions Not Stare Decisis.

When an act of Congress is held unconstitutional and then re-enacted by Congress, it comes before the Court as a new Act and is entitled to be considered as such. It has been so held even where the Act has been re-enacted with slight changes as well as where changes were made to comply with the decision.

Acts of Congress held to be unconstitutional as originally enacted have on several occasions been held constitutional when re-enacted in altered form with the design of meeting the Court's objections. Cf. *Hill* v. *Wallace,* 259 U. S. 44, and *Chicago Board of Trade* v. *Olson,* 262 U. S. 1 (*Grain Futures Acts*); *The Employers' Liability Cases,* 207 U. S. 463, and *Second Employers' Liability Cases,* 223 U. S. 1 (*Employers' Liability Acts*).

Proper respect for a coordinate branch of the government requires that the courts give a legislative act the most serious and exhaustive consideration before declaring it unconstitutional. *United States* v. *Harris,* 106 U. S. 629. The mere fact that an act introduces a new or novel method of procedure does not make it lacking in due process. *Hurtado* v. *California,* 110 U. S. 516. Neither does the fact that it involves an extension of existing legal doctrines. *Holden* v. *Hardy,* 169 U. S. 366.

It has been said: "that the doctrine of *stare decisis* can never be properly applied to decisions upon constitutional questions. However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the

law and not the decision of the Court." 2 Warren, The Supreme Court in United States History (1926) 748-9. The duty of the Court is to square a new statute with the Constitution itself. *United States* v. *Butler*, 297 U. S. 1. A new act of Congress should be entitled to fresh consideration by the courts and to a new and separate comparison with the Constitution. As a new congressional enactment it seems that the new Act should be entitled to an analysis on its own merits standing apart from the defects found in the first Act.

In *Hertz* v. *Woodman*, 218 U. S. 205, 212, Mr. Justice Lurton said:

> "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether or not it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided."

Again, in the case of *DiSanto* v. *Pennsylvania*, 273 U. S. 3, Mr. Justice Brandeis, in his dissenting opinion, said:

> "It is usually more important that a rule of law be settled, than that it be settled right. Even where the error in declaring the rule is a matter of serious concern, it is ordinarily better to seek correction by legislation. Often this is true although the question is a constitutional one. This is usually true so far as concerns a particular statute whether the error was made in construing it or in passing on its validity. *But the doctrine of stare decisis does not command that we err again when we have occasion to pass on a different statute.* In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken. * * *"

Again, quoting 2 Warren, the Supreme Court in *United States History*, 748-9:

> " 'Any citizen whose liberty or property is at stake has an absolute constitutional right to appear before the Court and challenge its interpretation of the Constitution, no matter how often they have been promulgated, upon the ground that they are repugnant to its provisions. * * * When the Bar of the country understand this, and respectfully but inexorably requires of the Supreme Court that it shall continually justify its decisions by the Constitution, and not by its own precedents, we shall gain a new conception of the power of our constitutional guaranties. * * * What we need is constant and unrelenting professional criticism of judicial opinions, and constant and unrelenting insistence that judicial errors of reasoning shall be judicially corrected.' Everett Abbott, Justice and the Modern Law (1913)."

Summary of Provisions of New Frazier-Lemke Act.

Subsections a-r of Section 75 as enacted Mar. 3, 1933, standing alone provided nothing but a temporary stay for the farmer-debtor during which he could negotiate with his creditor. We say creditor because in farm financing the first lien is almost always held by a single mortgage holder, who had the power to defeat any proposition submitted. It was found by experience that additional legislation was necessary to afford to the nation's largest industry the same opportunity to conserve security values that was provided for railroads and corporations.

The new subsection (s) of Section 75 of the Bankruptcy Act provides that any farmer-debtor who fails under subsections a-r of Section 75 to effect a composition with his creditors may amend his petition or answer asking to be adjudged a bankrupt. All the debtor's property wherever located is then to be appraised at its fair and reasonable

market value. His unencumbered exemptions are set aside to him.

The debtor is allowed to retain possession of any part or all of the remainder of his property for a period of three years under supervision and control of the court. *The debtor is required to pay a reasonable rental into court for the part of the property he retains.* This rental is to be applied first to pay taxes and upkeep of the property, and the remainder distributed among creditors, secured and unsecured, and applied on their claims as their interests may appear. *The court is given power to sell unexempt and perishable personal property if deemed necessary to protect the interests of creditors. The court may, if it sees fit, require payments on principal with a view to the debtor's ability to pay.*

After three years have elapsed, or sooner if he desires, the debtor may pay into court the amount of the appraisal of the property of which he has retained possession and the court will turn over to him full title to and possession of that property, free and clear of encumbrances. This procedure is subject to two provisos: 1. On the request of any creditor, secured or unsecured, or of the debtor, *the court may order a reappraisal of the property and require the debtor to pay that price.* 2. *On the demand of any secured creditor the court must order the property on which the creditor has a lien sold at public auction. If the debtor fails to comply with the provisions of the Act, or any court order made thereunder, a trustee may be appointed and the property sold as in other bankruptcy cases.*

New Frazier-Lemke Act is an Act on the Subject of Bankruptcies.

It has been claimed that the Frazier-Lemke Amendment is not a law on the subject of bankruptcies. But in view of the very broad definition given to the subject of bank-

ruptcies by the courts this objection seems untenable. See *In re Klein* (C. C. Mo.), reported in note to *Nelson* v. *Carland,* 1 Howard 265; *In re Reiman,* 7 Ben. 455, Fed. Cas. 11673; *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555.

In re Chicago, Rock Island & Pacific Ry. Co. (7 C. C. A.), 72 F. (2d) 443, the court said:

> "Under the Federal Constitution, Congress 'is authorized to enact such bankruptcy legislation as it may deem wise and appropriate. The constitutional grant of authority is not conditional nor limited,' save as to uniformity."
>
> * * * * * * *
>
> "Congress, having the express authority to enact legislation on the subject matter of bankruptcy, was the sole judge of the means and their appropriateness to the purpose of the legislation so long as said means did no violence to the Constitution."

In *Continental Ill. National Bank and Trust Co.* v. *Chicago Rock Island & Pac. Ry.,* 294 U. S. 648, the Supreme Court held Section 77, the moratorium law for railroads, to be constitutional. Mr. Justice Sutherland said:

> "While attempts have been made to formulate a distinction between bankruptcy and insolvency, it has long been settled that, within the meaning of the constitutional provision, the terms are convertible.
>
> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The court summed up its conception of the power to legislate on the subject of bankruptcy after summarizing the laws of 1800, 1841 and 1867, as follows:

> "The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or

accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."

"Whatever relates to the subject of bankruptcy is within the jurisdiction of Congress; and, to say that the law as existing at the time of the Revolution, or the adoption of the Constitution, shall furnish the rule and limitation of legislation, would take a large part of the subject out of their jurisdiction." *In re Reiman,* 12 Blatch. 562, 13 N. B. R. 128, 20 Fed. Cas. No. 11675.

"Where plenary power is given by the Constitution and Congress sees fit to use only a part of it, that fact will not prevent Congress from exercising the full power whenever it chooses to do so. *In re Reiman* (D. C.), Fed. Cas. No. 11673 and Id. (C. C.) Fed. Cas. No. 11675."

The New Frazier-Lemke Act Does Not Take Property Without Due Process.

The first section 75 (s) was held unconstitutional on the ground that it deprived a secured creditor (mortgagee) of property without due process of law thus violating the Fifth Amendment to the United States Constitution. Opponents insist the present section 75(s) is also invalid because it fails to comply with the due process clause.

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, holding the first section 75(s) void the Court listed five rights of a secured creditor which were said to have been impaired.

The "five rights" are:

1. "The right to retain the lien until the indebtedness thereby secured is paid."

2. "The right to realize upon the security by a judicial sale."

3. "The right to determine when such sale shall be held, subject only to the discretion of the court."

4. "The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through the receipt of the proceeds of a fair competitive sale or by taking the property itself."

5. "The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."

It will be noted that this Court did not hold that the original Frazier-Lemke Act was unconstitutional because of the infringement of all of these rights. The Court held the Act unconstitutional because it was in violation of the Fifth Amendment, the due process clause of the Constitution. In fact, in *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648, this Court in holding Section 77 of the Bankruptcy Act constitutional must have found that all of these so-called rights enumerated in the Radford case were qualified and subject to the Federal Constitution. We say this because Section 77 of the Bankruptcy Act, providing for reorganization of railroad corporations, is much more drastic and arbitrary as far as the creditor's rights are concerned than is subsection (s) of Section 75 of the Bankruptcy Act. A mortgagee's right is subject to the provisions of the Federal Constitution and the laws enacted under that Constitution.

It was held that the taking of these five so-called rights *as a group* had the effect of substantially impairing the mortgagee's security. It is clear from a reading of the Act that rights numbered (1), (2) and (4) are fully and completely preserved by the new subsection (s).

Right numbered (1). "The right to retain the lien until the indebtedness thereby secured is paid." This right is protected by subsection (s) (1) which provides that all existing liens, mortgages, pledges or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges or encumbrances shall be subject to the claims of the secured creditors as their interests may appear.

Rights numbered (2) and (4). "The right to realize upon the security by a judicial sale," and "The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through the receipt of the proceeds of a fair competitive sale or by taking the property itself." These rights are protected by subsection (s) (3) which provides "that upon request in writing of any secured creditor or creditors, the Court *shall* order the property on which such secured creditors have a lien to be sold at public auction." The creditor may bid at such sale.

Rights numbered (3) and (5). "The right to determine when such sale shall be held, subject only to the discretion of the court," and "The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt," are not substantive but remedial rights and as such subject to control under the Bankruptcy power. They are only rela-

tive or remedial rights which may be and *have been* suspended or taken away without violating the due process clause of the Fifth Amendment.

Perhaps the easiest way in which to demonstrate the relative or remedial nature of rights numbered (3) and (5) is to examine two other recent amendments to the Bankruptcy Act by which such remedial rights are taken. These sections, 77 and 77B, received judicial consideration in:

Continental Ill. Nat. Bank and Trust Co. v. *Chicago, Rock Island and Pacific Ry.*, 294 U. S. 648 (holding the original Section 77 of The Bankruptcy Act (Mar. 3, 1933, 47 Stat. 1474) constitutional).

Campbell v. *Allegany Corporation* (C. C. A. 4th, 1935), 75 F. (2d) 947, cert. denied 296 U. S. 581 (holding Section 77B of The Bankruptcy Act constitutional).

In the *Rock Island* case it was held that a creditor holding notes of the debtor could be enjoined from selling collateral securing said notes pending preparation and approval of a plan of reorganization under Section 77, this in spite of the following clause in each note:

> "Upon default of any kind hereunder, the payee may sell in * * * New York City, or elsewhere all or any of the security held for the payment of this note, at any broker's board or at public or private sale, without * * * notice. * * * And the payee may be the purchaser of any or all property, rights and/or interests so sold. * * *"

It is claimed in the instant case that the power of sale of a trustee under a deed of trust is more absolute than the right of a mortgagee to demand a foreclosure sale on a mortgage. *But such a right of sale is surely not more absolute than the right of the secured creditor to sell collateral which was suspended in the Rock Island case.*

A study of the chart, on page 23 of this brief, comparing treatment of the secured creditor's so-called five rights referred to in the *Radford* case under Sections 75(s), 77 and 77B of the Bankruptcy Act shows that in no case does Section 75(s), the Frazier-Lemke Amendment, treat creditor's rights more arbitrarily than either Section 77 or Section 77B. In most situations Section 75(s) does not go nearly so far as do the other sections.

CHART.

Creditor's rights	Section 75(s)	Section 77 (Act of Mar. 3, 1933)	Section 77B
1. Right to retain lien or security until indebtedness thereby secured is paid.	Subsection (s) (1) expressly continues existing liens and encumbrances in full force and effect.	If a plan is approved new securities may be substituted or other arrangements made.	Same as Sec. 77.
2. Right to realize upon the security by sale.	Expressly granted by Subs. (s) (3)	Denied if a plan is approved, and suspended pending approval.	Same as Sec. 77.
3. Right to determine time of sale subject to the discretion of the court.	Suspended for 3 years unless court declares emergency has ceased in its jurisdiction.	Denied if plan is approved. Suspended pending approval.	Same as Sec. 77.
4. Right to bid at sale whenever held to assure primary application of security to satisfaction of the debt.	Creditor may bid.	Denied if a plan is approved.	Same as Sec. 77.
5. Right to control property during period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.	Control in Bankruptcy court for 3 years. Rent paid into court to pay taxes and upkeep, and remainder distributed among creditors as their interests appear. Creditor relieved of taxes, upkeep and expenses of receivership.	Under original Sec. 77, the court could appoint a trustee pending reorganization or allow debtor to continue in possession.	Same as Sec. 77.

Comparison of Treatment of "Five Rights" under Sections 75(s), 77 and 77B.

Section 75(s)(1) preserves the secured creditor's lien in full force and effect to the full value of the *specific property* securing the lien. A plan approved under either Section 77

or 77B can substitute new and different securities or none at all for the creditor's security. Sec. 77(b)(1). Sec. 77B (b)(1).

Section 75(s)(3) provides that on written request any secured creditor may have the property on which he has a lien sold at public auction. If a plan is approved under either Section 77 or 77B, the creditor is denied the right to sell the original collateral security. Pending approval of a plan the creditor was enjoined from sale of collateral in the Rock Island case, *supra*. While a reorganization plan under Section 77 or Section 77B may provide substitute security, there is no assurance that such security will be salable. At any rate a plan under 77 or 77B need not provide any security whatsoever for some classes of creditors.

Under Section 75(s) (2) the creditor's right to determine the time of sale referred to above is postponed for three years. The constitutionality of this moratorium feature is discussed at pages 42, 47 of this brief. Under Sections 77 and 77B no sale of the original collateral is allowed.

Under Section 75(s) a secured creditor *may* bid at the sale whenever held. *This assures to the creditor either the application of the proceeds of the sale to the satisfaction of his lien or else the right to take the property itself. No sale of the original collateral could occur after a plan of reorganization was approved under either Section 77 or 77B.*

Under Section 75(s)(2) the control of the property is vested in the bankruptcy court for a period of not more than three years. The debtor is allowed to keep possession, but must pay a reasonable rent into court. This rent is applied on taxes and upkeep and the remainder distributed among creditors as their interests may appear. *The court may in its discretion order the farmer to make additional payments on the principal.*

The law dispenses with the expense of receivership and substitutes the conciliation commissioner. It cleverly insures

the exercise of good husbandry by the farmer by holding out the inducement of the redemption of his farm. The farmer will naturally do a better job of farming than an unexperienced mortgage holder or a receiver compelled to operate the farm by hired labor. In the words of the Magazine of Wall Street of Feb. 18, 1933: "The borrower cannot pay and the lender cannot farm."

Under Section 77 as originally enacted on March 3, 1933, and upheld by this Court in the *Rock Island* case, a debtor could be allowed to retain possession of its property pending completion and approval of a plan of reorganization. Sec. 77(c). See *Lansdown* v. *Faris* (C. C. A. 8th, 1933), 66 F. (2d) 939. The amended Section 77, Aug. 27, 1935, 49 Stat. 926, has made mandatory the appointment of a trustee or trustees. However, it was the original Section 77 upon which this Court passed in the *Rock Island* case. Section 77B(1) allows the judge in his discretion to continue the debtor in possession after a petition is filed and pending formulation and approval of a plan of reorganization.

The foregoing comparison has considered the position of a non-assenting minority creditor under Sections 77 and 77B in a case where two-thirds of the class of creditors to which he belongs have consented to the plan of reorganization. The opinion in the *Radford* case suggests a distinction between Section 75 and Section 77 on the grounds that under certain proceedings under Section 77 two-thirds of the creditors must give their consent. That is not a constitutional distinction. The Constitution recognizes neither majorities nor minorities and most assuredly the due process clause doesn't. *Eubank* v. *Richmond*, 226 U. S. 137; *People* v. *Hurlbut*, 24 Mich. 44, 108; Story, Miscellaneous Writings, 620.

On this subject let us repeat that the Court cannot logically hold Section 77 and Section 77B constitutional, which are far more drastic than Section 75, including the new sub-

section (s), and then hold the new subsection (s) of Section 75 unconstitutional. It cannot do this unless in the eyes of the law soulless corporations are entitled to privileges that thirty million men, women, and children made of human blood and flesh are not. This we know is not the position of this or any other Court. Section 77, Section 77B and Section 75, including the new subsection (s), must stand or fall together under the Constitution. It must be clear that in enacting these provisions Congress was endeavoring to preserve the entire property structure of the nation in the interest of all the people including security holders.

This Court has held Section 77 constitutional and it has indirectly upheld the constitutionality of Section 77B in *Continental Ill. Nat. Bank and Trust Co.* v. *Chicago, Rock Island & Pacific Ry.*, 294 U. S. 648, and *Campbell* v. *Allegany Corporation* (C. C. A. 4th, 1935), 75 F. (2d) 947, cert. denied 296 U. S. 581.

Position of Non-Assenting Majority Creditors under Sections 77 and 77B.

The attention of the Court is now especially directed to the position of non-assenting secured creditors under Sections 77 and 77B *in a case where such creditors may constitute a majority of all creditors whose interests are affected by a plan of reorganization.* The sections referred to are Sections 77(g) (6) and 77B(b) (5) which are substantially similar. They provide for the protection of the *value* of liens where one-third *or more* of a given class of secured creditors refuse to consent to a plan. Since the acceptance of any such class of creditors is not required for the confirmation of a plan under 77B(e)(1) or the original 77(e), a situation can readily be contemplated under either Section 77 or 77B where a majority of secured creditors do not consent to a plan of reorganization. Still the plan could

be approved under either of the above Sections. The following provisions are quoted from 77B(b)(5):

> [A plan of reorganization] "(5) shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan make provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims or liens, if the property affected by such interests, claims or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims or liens, [or by the retention of such property by the debtor subject to such interests, claims or liens—this clause does not appear in Section 77], or (b) by a sale free of such interests, claims or liens at not less than the fair upset price, and a transfer of such interests, claims or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims or liens, or, at the objecting creditor's election, of the securities allotted to such interests, claims or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection. * * * (10) * * * In the case of secured claims entitled to the provisions of clause (5) of this subdivision (b), the value of the security shall be determined in the manner provided in section 57 clause (h) of this Act, *and if the amount of such value shall be less than the amount of the claim, the excess may be classified as an unsecured claim.*"

Section 77B(e)(1) further provides:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the

> proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the plan. * * * *Provided, however, That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors* * * * (*c*) *if provision is made in the plan for the protection of the interests, claims or liens of such creditor or class of creditors in the manner provided in subdivision* (*b*) *clause* (*5*) *of this section.*''

The original Section 77(e) is similar.

The question of the constitutionality of subsection (b)(5) of Section 77B was considered by this Court in *Tennessee Publishing Co.* v. *American National Bank,* 299 U. S. 18, Nov. 9, 1936. The Court, however, expressed no opinion as to the validity of the said clause since it was found the lower courts had correctly rejected the plan of reorganization involved in the case because it was not workable.

The Court indicated that a '' 'fair and equitable' '' and '' 'feasible' '' arrangement between debtor and creditor might meet the ''good faith'' requirement of Sec. 77B.

It is difficult to distinguish the new subsection (s) of Section 75 from Sections 77(g)(6) and 77B(b)(5). Except for the three-year stay of proceedings in Section 75, the sections would seem identical in operation. Unless the Court holds that the Federal Government may not exercise a power analagous to the Police Power and thereby provide for a reasonable moratorium period, the *Rock Island* case, 294 U. S. 648, and *Campbell* v. *Allegany Corporation,* 79 F. (2d) 947, must be modified. At pages 44-54 of this brief we show that the United States *does have a power similar to the Police Power which it has constitutionally exercised in many cases.*

> ''So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well

settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause." *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24-25.

The Frazier-Lemke Amendment Is a Reasonable Adaptation of Bankruptcy Proceedings to Farmers' Conditions.

Like the first Frazier-Lemke Bankruptcy Amendment, the present Section 75(s) is an attempt to adapt bankruptcy proceedings to the general agricultural situation. These Acts are among a series of Bankruptcy Amendments which were enacted at intervals following an investigation of bankruptcy law and procedure made under the supervision of the Attorney General.

On February 29, 1932, President Hoover submitted a report of the results of this investigation to Congress. See Senate Document 65, 73rd Congress, 1st Session. The President said:

> "The bankruptcy act should be amended to provide remedial processes in voluntary proceedings under which debtors, unable to pay their debts in due course, for the purpose of composing or extending the maturity of their debts, of amortizing the payment of their debts out of future earnings, of procuring the liquidation of their property under voluntary assignment to a trustee; or in the case of corporations for reorganization."

Subsequently Sections 74, 75, 77 and 77B were enacted. All of these recent Bankruptcy Amendments had the same purpose back of them: To make bankruptcy procedure more flexible and more adaptable to the different problems existing in relation to different classes of debtors and property. Because of the numerous differences between a corporate

or railway debtor, and a farmer debtor, what is a reasonable bankruptcy provision in one case may not be reasonable in the other and *vice versa*.

In bankruptcy proceedings the court should be influenced by the consideration that a man can ordinarily do better with his own property and realize more therefrom, than can be obtained in the course of judicial proceedings, with compulsory sales and expenses of administration. *In re Arrington Co.* (D. C. Va., 1902), 113 F. 498.

In *Dallas Joint Stock Land Bank* v. *Davis*, *supra*, Judge Hutcheson said of the new Frazier-Lemke Act:

> "On its face the act merely transfers the liquidation of the indebtedness from state courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation in lieu of an unduly hasty and forced one. Subsection (s) of the act as amended does indeed authorize a stay of proceedings for a maximum period of 3 years, during which time the debtor may remain in possession, *but the stay so granted is not an absolute one*. It is one granted and continued in the judicial discretion of the court if, and only if, this may be done without deprivation of or injury to, and upon conditions looking to the preservation of, the creditor's security. Under its provisions the court may fix, and require the debtor to pay a reasonable rental on the property to be applied upon the debt. Under its provisions, the court may, and if in the exercise of a sound discretion the protection and preservation of the security demand it, must require additional payments on the principal sum due and owing. Under its provisions, the court may, upon a finding that the preservation of the security requires it, revoke the stay order and direct the sale of the property.
>
> "These provisions of the act make it clear, we think, that the act grants no absolute stay, permits no arbi-

trary or unjust interference with creditors. It merely remits all questions to an informed judicial discretion, a discretion which, keeping the preservation of the security paramount, may yet, if circumstances permit, afford a means of relief to the debtor. They make it clear that the controlling, the dominant purpose and effect of the act as amended is not to deprive creditors of their security to give it to debtors, but to remit to judicial discretion in each case, whether the facts justify giving the debtor an equitable opportunity in an orderly way, to liquidate his indebtedness, provided always that the essential security of the creditor is not impaired but preserved. A law on the subject of bankruptcies having this purpose and effect is not, in our judgment, violative of the Fifth Amendment. * * *"

Reasonableness and Necessity of Frazier-Lemke Amendment Shown by Statistics.

The necessity for the Frazier-Lemke Amendment can not be doubted by any person informed concerning conditions since 1920 pertaining to agriculture. Prices for agricultural products paid to the farmer (which are quite different from the prices paid by the ultimate consumer) have consistently fallen lower and lower until for such products as milk, eggs, livestock, wheat, hay, cotton and corn he has actually received less than the cost of production. The price of alfalfa hay at the farm has been as low as two dollars per ton. As a group farmers have been compelled to meet expenses out of their capital by mortgaging their farms. Both mortgagors and mortgagees confidently expected farm incomes to increase. Instead of increasing they decreased quite steadily since 1920. Prices paid *by the farmer* for necessary agricultural machinery, fertilizer, prepared feed stuffs for completing balanced rations, etc., not to mention taxes, have remained stationary or have actually increased in the face of falling land values. In one

year the *total cash income* (not net income) of all the farmers of the United States was less than the total interest and tax exemptions on the total public debt.

The *Senate Judiciary Committee Report, No. 985,* and the *House Judiciary Committee Report, No. 1808,* 74th Congress, 1935, contained the following statements:

> "It is not necessary for the committee to point out the necessity for this legislation. There are few members in this Congress that have not already received numerous letters, many of them from conciliation commissioners and referees, pointing out that before the Supreme Court held subsection (s) of Section 75 unconstitutional, they were able to settle nine out of every ten cases out of court because of the Frazier-Lemke Amendment, but that since the decision wholesale foreclosures have been started. The fact that there is now a higher price for agricultural products has made the property more attractive, and many mortgagees have taken advantage of this fact, and are now foreclosing, whereas before the increase in price, they were quite willing to permit the farmer to continue and do the best he could.
>
> "Many state moratoriums, and there were 26, are about to expire, and when they expire, there undoubtedly will be an avalanche of foreclosures; whereas, if this bill is passed, these foreclosures will be held in abeyance. Nine out of ten of the distressed farmers will be able to get adjustments outside of court, because of the moral effect of the act, and in the rest of the cases, there will be orderly liquidation, with a view of the rehabilitation of the farm debtor, as well as full protection to the creditors. This the public conscience, as well as public interest and welfare, demands."

The declarations of the existence of an emergency by a legislative body can not be regarded as a subterfuge or as lacking in adequate basis. *Home Building and Loan Asso-*

ciation v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413; *Block* v. *Hirsh,* 256 U. S. 135, 65 L. Ed. 865.

47 Harvard Law Review, page 300:

> "Despite a widespread attempt to secure voluntary time extensions, it became apparent by 1933 that disastrous social and economic consequences would ensue unless positive relief was granted."

86 A. L. R. 1539, 1542:

> "Such an emergency is presented by the present depression. Widespread unemployment in all lines of work, rioting, open defiance of the processes of the courts, millions of citizens dependent on charity and wholesale mortgage foreclosures and the accumulation of deficiency judgments, are all elements frought with dangers which threaten the very existence of government. That the states, in time of emergency may adopt measures which could not be sustained in normal times, can not now be doubted. The New York and District of Columbia Rent Law cases definitely established this principle."

The agricultural depression began in 1921. The bulletin of the Bureau of Agricultural Economics, February 1, 1935, shows the following facts concerning the percentages of farm income compared with national income.

In 1921 it fell to 12.6 per cent or $4,000,000,000.00.

In 1930 it had fallen to 8.7 per cent.

In 1931 it was 7.7 per cent.

In 1932 it was 7.5 per cent.

In 1933 the price of agricultural land in Iowa had fallen from $236.00 an acre in 1921 to $70.00.

Professor Paul H. Douglas gives an estimate of 1½ billions of dollars as the total net cash income of the farmers in 1932. "Know America," page 57.

While the percentage of agricultural income compared with total national income was decreasing from 8.7 per

cent in 1930 to 7.5 per cent in 1932, the total national income was also decreasing absolutely from $72,973,000,000.00 in 1930 to $47,964,000,000.00 in 1932. World Almanac, 1936. Not only was the percentage of agricultural income decreasing but also the base on which that percentage was figured was also decreasing. The farmer's income was decreasing both relatively and absolutely.

The Federal Home Loan Bank Review is authority for the statement that during the first eight months of 1936 the Farm Credit Administration has foreclosed or arranged to foreclose 30,627 farm mortgages or at the rate of 3,782 per month. This is exclusive of all private holders of farm mortgages.

51 Magazine of Wall Street 470. February 18, 1933:

> "The farm mortgage situation is more acute than it appears. Less than half of the farms are not mortgaged, leaving the rest to carry the enormous mortgage load. Here is another angle of the problem: From 1914 to 1929 the massed purchasing power of all producers increased 61 per cent, that of the farmers, only 21 per cent. Manufacturing laborers gained 108 per cent, while management and capital gathered in a gain of 153 per cent. Something had to break. Something did break in 1929. Other things are breaking now. The ground is being cleared for a more or less complete readjustment of that portion of the private debt problem represented by mortgages.
>
> "Again, farm mortgages have been a persistent curse since 1920. Urban mortgages have been a baffling problem for only two or three years. The farmers have paid off a billion of non-mortgaged debt since the great debacle of 1920-21. Since the 1929 explosion they have forfeited another billion of wealth to satisfy mortgages and taxes—and a tax lien is, after all, only a super-first mortgage. Paint black the tax-delinquent farms and the map of rural America takes on a dark

and foreboding aspect. And real estate mortgages are not all of the blackness, for the farmers have, also, indebtedness not secured by land of about three billions—close to 12 billions all told."

51 Magazine of Wall Street 472. February 18, 1933:

"The conviction is general that the interest rates that prevailed before 1929 must be forgotten; this is true in practically every species of financial obligation. * * * It is not human nature, at least not of the American stripe, for a whole generation to endure sacrificial torture out of respect to a dead and decaying past. Debts contracted on the security of land when it was worth five times as much and yielded several times as much as now in money income and purchasing power can not endure. They are as incongruous with the new environment as high heels and desert sand. * * * Mortgages based on valuations that are as obsolete as the five toed horse will be rewritten in relation to the facts. A $20,000 mortgage on a $10,000 farm is only a fantastic memory. The borrower cannot pay and the lender cannot farm."

Recent Improvements in Farm Conditions Show that Suspension of Sale of Farm Property Will Benefit Both Creditor and Debtor.

If the foregoing statistics indicated that agricultural property and income had definitely slumped to a lower standard of value from which there could be no hope of recovery, it might be conceded that the Frazier-Lemke Amendment was only attempting to postpone an inevitable dispossession of farm home owners. Recent figures, however, paint a brighter picture. They indicate that the value of farm property is increasing. They also indicate that the prices paid for farm products are increasing in relation to the prices the farmer pays for the products which he consumes.

The following quotations are from the Yearbook of Agriculture (1936), pages 28-33:

Farm Income.

"It is too early as yet to estimate, except roughly, the return to farmers from their production in 1935. Marketing of the crops will not be finished until well along in 1936. Present indications are that the farmers' gross income from this year's production, and from rental and benefit payments, will be approximately, $7,800,000,000. This total may be compared with $7,300,000,000. gross income from the production of 1934, and $5,337,000,000. in 1932 when the depression was at its worst. In 1929 in which year the gross farm income was at the highest level since 1920, the total was nearly $12,000,000,000. While the gross farm income for 1935 is approximately one-third lower than that of 1929, the prices paid by farmers for goods and services are about one-fifth lower. The 1935 gross farm income will have about four-fifths of the purchasing power that the gross farm income of 1929 had. * * *"

Purchasing Power of Farm Commodities.

"In the 2 years ended February 1935 the general level of farm prices more than doubled; since then the trend has been slightly downward. The greatest advances since 1933 have been in grain, cotton and livestock prices. In the second half of 1933 and in the first half of 1934 the prices of the things that farmers buy rose rapidly. The result, of course, was to partly offset the advantage to agriculture of the rise in farm prices. In the last year or so the prices of commodities purchased by farmers have remained practically unchanged at around 126 per cent of the pre-war level. In September 1935, when the farm-price index was 107, the purchasing power per unit of farm products for articles farmers buy was 86 per cent of the pre-war average. * * *"

Valuation of Farm Assets.

"Still another significant factor in the welfare of agriculture is the change in the valuation of farmers' assets. This change may result from changing prices for farm land and livestock and from increases or decreases in farm inventories. From 1930 to 1933 the value of farm property in the United States declined nearly $22,000,000,000. It has recovered moderately in the last 2 years but is still nearly $20,000,000,000. less than in 1930. On a reduced property valuation, a given monetary income will show a higher rate of return and *vice versa.* * * * The income available to farm operators for labor, capital and management from the production of 1934 was $3,468,000,000. as compared with $2,683,000,000 in 1933 and $1,492,000,000. in 1932. The figures given above may be compared with $5,669,000,000. for 1929, the last pre-depression year. These figures make no allowances for delinquencies in interest and tax payments, which in recent years have increased markedly. In 1934, however, the farmers paid considerable amounts in deferred taxes and interest; * * *"

Farm Land Values.

"Farm land values tend normally to vary with farm earning power, current and prospective, and the prevailing recovery follows a long period during which the curve was downward. This Department's index of the average value per acre of farm real estate rose, in the 12-month period ending March 1, 1935, from 76 to 79 per cent of the pre-war level."

Interpretation of Statistics Quoted.

The above quotations clearly indicate that farm income and the valuation of farm property is gradually increasing. At the same time this income and valuation is still considerably below normal. The farmer has every prospect of eventually regaining his normal position in society, but he must be given time to do so.

The traditional theory of a mortgage or deed of trust is that the mortgaged or pledged property is to stand as security for the debt. *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Hutchins* v. *King*, 1 Wall. 53; *Terrell* v. *Allison*, 21 Wall. 289; *Gilman* v. *Illinois, etc., Tel. Co.*, 91 U. S. 603. Any creditor who merely desires to have the payment of a debt owed him secured is not harmed by a delay in sale of the security when the valuation of agricultural property is generally on the increase. So long as he has the right to have a sale within a reasonable time, the creditor is benefited by the interim increase in value.

Farm Debt Situation Still Desperate.

While the value of farm lands has increased the agricultural debt structure has remained practically the same except as reduced by foreclosures. The increase in the value of farm lands has in fact stimulated foreclosures. This increase in value is due to an increase in agricultural commodity prices, and also because the money in circulation has been increased by over half a billion, as shown by a comparison of the Treasury Circulation Statement of United States Money of November 30, 1935, with a similar statement of November 30, 1936. While money is easier in some respects, yet there is little money available for farm loans, The truth is that the farmer who really needs help cannot get it. As a result hundreds and thousands of farm foreclosures and evictions are taking place in practically every part of this nation.

The Farm Credit Administration informs us that during 1935 the Federal Land Banks and Land Bank Commissioner closed loans amounting to $445,066,549 and that during the same year they received applications for loans amounting to $811,081,485. In other words, the Federal Land Banks and Commissioner were unable, or for some reason did not make loans for $366,014,963 in 1935. These farmers are

those who really needed help. Since the Federal Land Banks are the most liberal in making farm loans, it is readily seen that these farmers are unable to get financial assistance anywhere at this time.

Again in 1936 the Farm Credit Administration informs us the Federal Land Banks and the Land Bank Commissioner closed loans amounting to $174,843,496 and that they received applications for loans amounting to $348,535,793. In other words in 1936 the Federal Land Bank was unable to accept applications amounting to $173,692,297.

The Frazier-Lemke Act is Consistent with the Theory of Bankruptcy in the United States.

A number of Supreme Court cases have pointed out that the purpose of the Bankruptcy Act was two-fold: First, to provide for an equitable distribution of the bankrupt's estate among his creditors. Second, to rehabilitate the bankrupt and to give him a fresh start in life free from the burden of his debts. *Neal* v. *Clark*, 95 U. S. 704; *Traer* v. *Clews*, 115 U. S. 528; *Burlingham* v. *Crouse*, 228 U. S. 459; *Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181; *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549; *Maynard* v. *Elliott*, 283 U. S. 273;

> "This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." (*Local Loan Co.* v. *Hunt*, 292 U. S. 234, at p. 244.)

The Court Has Stressed the Fact that the Bankruptcy Act is Founded on Sound Public Policy.

In *Stellwagen* v. *Clum*, 254 U. S. 605, Mr. Justice Day states that discharge is a main purpose of the Act, and

"Our decisions lay great stress on this feature of the law—as one not only of private but of great public interest, in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life." *In re Klein*, 1 How. 279, states:

> "For the present it will only be necessary to say that one prominent reason why the power is given to Congress was to secure to the people of the United States, as one people, a uniform law, by which a debtor might be discharged from the obligation of his contracts, and his future acquisitions exempted from his previous engagements; that the rights of debtor and creditor equally entered into the mind of framers of the Constitution."

In the *Rock Island* case, *supra*, the Court quotes with approval from *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 536:

> "The confirmation and legalization of 'a scheme or arrangement' under such circumstances (an agreement made by railroads with their creditors under a Canadian statute) is no more than is done in bankruptcy when a 'composition' agreement with the bankrupt debtor, if assented to by the required majority of the creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman Law. The Constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the

obligation of the body politic to protect him in life, liberty, and property. Bankrupt laws, whatever may be the form they assume, are of that character."

It Is Within the Power of the Court to Transfer the Creditor's Lien to the Proceeds of a Sale of the Property, and to Allow the Bankrupt to Repurchase the Property.

The power to transfer a lien from property to the cash proceeds of a sale of the property has been authoritatively determined by the decision of this Court in the case of *Van Huffel* v. *Harkelrode,* 284 U. S. 225, 78 A. L. R. 453, and note. This was an action to quiet title to land purchased by plaintiff acquired from the purchaser at a sale made by a bankruptcy court, which made an order that all liens be marshaled; that the property be sold free of all encumbrances and that the rights of all lien-holders be transferred to the proceeds of the sale. Defendant was a county treasurer asserting a lien for State taxes and claimed that the court was without power to order the sale and never acquired jurisdiction over the State. It was pointed out that there was no statute expressly conferring such power. This Court held that such power is possessed by courts of equity, and that the federal courts had exercised it in equity in many cases and that the courts of bankruptcy possessed jurisdiction in equity for the exercise of this power. It was held that the bankruptcy courts have express power under Section 64 to determine the amount or legality of any tax. It then said:

> "To transfer the lien from the property to the proceeds of the sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law must yield to the requirements of bankruptcy administration."

In some cases the courts have allowed the bankrupt to repurchase his property. *Traer* v. *Clews,* 115 U. S. 528;

Sparhawk v. *Yerkes,* 142 U. S. 1. Section 70(a) (5) of the Bankruptcy Act expressly permits the bankrupt to redeem certain insurance policies by payment of the cash surrender value to the trustee.

Congress May, under the Bankruptcy Power, Stay Judicial Proceedings for Three Years.

It has already been pointed out, *supra,* at pages 22-28, that these rights have been suspended or taken away under both Sections 77 and 77B of the Bankruptcy Act. It has also been held by this Court that these so-called rights could be suspended or taken away by States through the exercise of the Police Power.

In *Home Building and Loan* v. *Blaisdell,* 290 U. S. 398, it was held that the Minnesota legislature could through a moratorium law stay judicial foreclosure sale proceedings for a reasonable time. (Two years.)

The experience with bankruptcy administration has not been such even in normal times and under normal conditions to insure distribution in much less than 3 years. In times of emergency and economic distress it takes longer, because the problem of liquidation is more difficult and slower due to lack of buyers of bankrupt estates.

Various studies have been made of this question. In March, 1930, the so-called Donovan report was published. It was prepared by William J. Donovan, Esq., formerly Assistant Attorney General of the United States. He states that, while the tables of figures published are based on New York City Bankruptcy cases, they have been compared with similar statistics from all over the nation and are fairly representative of the country as a whole.

He pointed out that it took about 1 year to close the average no-asset cases and many 2, 3, 4 or even 6 years (p. 198-199). An interesting table at p. 354 shows that 5 years for the closing of a bankrupt estate is not at all un-

common. During that period liquidation goes on and distribution is not finally made until the estate is closed. The table is short and is as follows:

"Periods (in days) from filing of petition to close of case.

Liquidation Cases	Average Period.	Longest Period.	Shortest Period.
(a) No asset cases	331.3	2842 (8 yrs.)	61
(b) Nominal assets	620.3	2695 (7 yrs.)	62
(c) Gross assets under $10,000 (exclusive of (a) and (b)	697.7	3100 (8 yrs.)	107
(d) Gross assets over $10,000	1231.6	4419 (12 yrs.)	273
Average, all classes	720."		

We give these figures, as Mr. Donovan does, as facts and without criticism. Congress was undoubtedly familiar with them.

In the famous rent cases tenants were allowed to remain in possession of the leased premises over the objection of the lessor provided reasonable rent was paid. *Levy Leasing Co.* v. *Siegal*, 258 U. S. 242; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170. (These two cases came up under an act passed by the New York State Legislature. The tenants were permitted to retain possession from September 27, 1920 to November 1, 1922.) *Block* v. *Hirsh*, 256 U. S. 135. (This case came up under an act of Congress enacted for the District of Columbia. It permitted tenants to retain possession for two years.)

In the next section of this brief it will be shown that the Federal Government may within the scope of its granted authority exercise a power similar to the Police Power of the states. The power to pass laws on the "subject of bankruptcies" being expressly granted to Congress by Article I, Section 8, clause 4 of the Constitution, Congress

should, while acting within the scope of this granted power, be able to constitutionally exercise any power which a state could exercise under similar circumstances.

The Police Power of the United States.

In 6 Ruling Case Law, "Constitutional Law", paragraph 182, the police power is said to be, "an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government."

Bouvier defines police power as "the powers of government inherent in every sovereignty." "The power vested in the Legislature to make such laws as they shall judge to be for the good of the commonwealth and its subjects."

Congress has the same police power within the grants of power enumerated in the Constitution as the states have within their reserved powers. Wherever the Federal government has police power it is precisely the same police power that the states exercise.

Police power is a concomitant and inherent incident of all sovereignty. It is not a separate legislative power such as the power to tax, the power to regulate commerce, the power to legislate on the subject of bankruptcies, the power to coin money, and so forth. Wherever political power is, there is an exercise of sovereignty and with it goes the incidental police power inseparably attached to it. The Constitution does not grant police power in any of the eighteen clauses granting power under Section VIII of Article I. The Tenth Amendment in providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are preserved to the states respectively, or to the people," refers to specifically delegated powers and not to those attributes of sovereignty incidental to those powers which are delegated. Wherever sovereignty goes, police power goes to the full limits of the sovereignty without restraint. Wherever sovereignty is re-

stricted there in all respects and to the exact extent the inherent police power is also restricted and limited. This is true alike of state sovereignty and of Federal sovereignty.

An expression sometimes used in discussions of police power is that the states did not in the Constitution delegate their police power to the United States. The argument runs that by the Tenth Amendment "the powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"; that consequently the police power is reserved to the states and therefore the United States government has no police power. This statement is not accurate. The correct statement concerning the exercise of police power as it relates to the states and to the Federal government, respectively, is as follows: Police power is an attribute of all sovereignty. Whatever sovereignty the people have not ceded to the United States together with the police power inherent within such sovereignty is reserved to the states as an attribute of their respective sovereignties. The United States in respect to all sovereignty granted to it by the people is in such respects endowed with all attributes of such sovereignty including the complete exercise within such sovereignty of the police power.

12 *Corpus Juris,* "Constitutional Law", page 910, says (concerning the federal police power):

> "Within the states Congress may exercise no police power as such, and may affect it only by the enactment of statutes within the powers conferred on it by the Constitution of the United States, either expressly or by clear implication."

65 *Corpus Juris,* "United States", page 1255, paragraph 5:

> "So, too, although the United States has no general police power, it has whatever police power is appro-

priate to the exercise of any attribute of sovereignty specifically granted to it, and may, by virtue of its sovereignty, take such measures as are necessary to insure peace and order in performance of any of its functions. The scope and incidents of the government's express and implied powers are the same, and a power may be implied as an incident to a power which is itself implied."

The growth of the conception of police power generally is illustrated in *Euclid* v. *Ambler*, 272 U. S. 365, which sustained as within the police power a zoning ordinance forbidding the use of real estate for industrial purposes, for which its value was $10,000 per acre, and restricting its use to residential purposes at a value of $2,500. (P. 384 of the opinion.) Justice Sutherland in the opinion pointed out, at pages 386 and 387 that zoning ordinances had existed for about twenty-five years and were uniformly sustained, but fifty years previously would probably have been rejected as arbitrary and oppressive. Then the opinion continues: "And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operations. In a changing world it is impossible that it should be otherwise". The United States Department of Commerce, Bureau of Standards, in Circular Letter LC-374, dated May 5, 1933, estimated the number of municipalities in the United States having zoning ordinances at 1236. Such legislation under the police power effectively destroys the value of real estate without payment to the owner. He is deemed to benefit from the general benefits accruing to the community.

The Moratorium is a Proper Exercise of Federal Police Power.

All the powers granted to the United States by Article I, Section VIII are cognate powers.

Constitution of the United States, Article I, Section 8.

Clause 1. "The Congress shall have power" to lay and collect taxes.

Clause 2. To borrow money.

Clause 3. To regulate commerce.

Clause 4. "To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States."

Clause 5. To coin money, and fix weights and measures.

Clause 6. To punish counterfeiting.

Clause 7. To establish post offices and postroads.

Clause 8. To grant patents and copyrights.

Clause 9. To constitute Federal courts.

Clause 10. To define and punish piracies, etc.

Clause 11. To declare war, etc.

Clause 12. To raise armies.

Clause 13. To provide a navy.

Clause 14. To govern land and naval forces.

Clause 15. To call out the militia.

Clause 16. To organize the militia.

Clause 17. To govern the seat of government and government property.

Clause 18. "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers." * * *

It is within the respective fields of sovereignty enumerated in the foregoing cognate powers that Congress may exercise full police power to the same extent that a state Legislature may exercise police power within the fields of

sovereignty not granted to the Federal government. There is no difference in the police power exercised; the only difference is in the particular fields of sovereignty which are exercised.

In *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146, 156, Mr. Justice Brandeis said in the opinion of the court:

> "That the United States lacks the police power, and that this was reserved to the states by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the power conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose." • • •
>
> "The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations, • • • but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power." • • •

The opinion proceeds to give, as illustrations of the statement just quoted, the same cases which other authorities cite to illustrate the police power of the Federal government within its granted sovereignty. We quote pertinent parts from each of the cases cited by Mr. Justice Brandeis:

Commerce Clause (prohibition of lottery shipments): *Champion* v. *Ames*, 188 U. S. 321, 357:

> "As a state may for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another." • • •

"What was said by this court upon a former occasion may well be here repeated: 'The framers of the Constitution never intended that the legal power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge.' *In re Rhorer*, 140 U. S. 545, 563."

Taxation clause (restricting sale of oleomargarine): *McCray* v. *U. S.*, 195 U. S. 27, 59:

"Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of the power may not be judicially restrained because of the results from its exercise."

In passing the opinion observed that the Fifth and Tenth Amendments did not interfere with the granted power involved in the decision and said:

"Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and the proposition is therefore disposed of by what has been said on that subject."

That is, this Court held that the Fifth and Tenth Amendments have their proper application in the consideration of the constitutionality of an act of Congress but they do not deprive the United States of the exercise of police powers.

Commerce clause (prohibition of adulterated food shipments): *Hipolite Egg Co.* v. *U. S.*, 220 U. S. 45, 57, 58:

"The statute rests, of course, upon the power of Congress to regulate interstate commerce; and, defining

that power, we have said that no trade can be carried on between the states to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution." * * * "The question in the case, therefore, is, what power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce."

Commerce clause (White Slave Act), *Hoke* v. *United States,* 227 U. S. 308, 321, 323. Justice McKenna in the opinion said:

"Congress is given power 'to regulate commerce with foreign nations and among the several states.' The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack."

"The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several states;' that the power is complete in itself, and that Congress, as an incident to it, may

adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

The last paragraph was also quoted and was approved by the Supreme Court in *Caminetti* v. *U. S.*, 242 U. S. 470, 492.

Commerce clause (prohibition of false labels), *Seven Cases* v. *U. S.*, 239 U. S. 510, 514, 515:

> "So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, 36 Stat. at L. 825, Chap. 395, Comp. Stat. 1913, Section 8812. *Hoke* v. *United States*, 227 U. S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations."

Taxation clause (prohibition of narcotic drug trade), *U. S.* v. *Doremus*, 249 U. S. 86, 93, 94:

> "Of course, Congress may not, in the exercise of federal power, exert authority wholly reserved to the states. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power, does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing author-

ity conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it." • • •

"Nor is it sufficient to invalidate the taxing authority given to the Congress by the Constitution that the same business may be regulated by the police power of the state." • • •

"The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress—that is sufficient to sustain it."

The following two cases were also cited by Mr. Justice Brandeis in the *Hamilton* v. *Kentucky Distilleries* case, 251 U. S. 157, to show (quoting his words), that "the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power".

In Re Kemmler, 136 U. S. 436, 438:

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."

Carroll v. *Greenwich Ins. Co.,* 199 U. S. 401, 410:

"While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment, it would be hard to say that a state law in like terms was void under the Fourteenth."

Also in the case of *Brooks* v. *U. S.*, 267 U. S. 432, 436 (motor vehicle transportation), it was said by Mr. Chief Justice Taft:

> "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."

Block v. *Hirsh*, "Rent Law Case", 256 U. S. 135, 155 (Federal police power under the power granted by clause 17 to govern the District of Columbia). From the opinion of the court by Justice Holmes:

> "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken without pay."

The sovereignty of the United States under Clause 4, Section VIII, Article 1 to "establish uniform laws on the subject of bankruptcies" is as untrammeled as any of the other sixteen cognate sovereignties granted in the same section.

The moratorium in subsection (s) under the power of Congress to legislate upon "the subject of bankruptcies" is a proper exercise of the Federal police power. It is as valid as the power of a state to enact a moratorium during the existence of the same emergency under its police power. The state may exercise such police power despite the con-

stitutional prohibition in the Fourteenth Amendment that a state may not impair the obligation of a contract. *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 231, and in the words of Justice Brandeis in *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 157, the Fifth Amendment imposes no greater limitation upon the national power than does the Fourteenth upon state power.

The Frazier-Lemke Act Does Not Deny Full Faith and Credit to State Laws and Judicial Decrees

Some opponents of the Frazier-Lemke Act have argued that the Act violates Article IV, Section 1 of the Constitution. (The Full Faith and Credit Clause.) They argue that when the jurisdiction of a state court has first attached to real estate in a foreclosure action such jurisdiction is exclusive so that Congress may not confer any jurisdiction upon a bankruptcy court.

This argument is faulty because it fails to recognize that Congress' power to legislate upon the subject of bankruptcies is not concurrent with state power, but is general, unrestricted, unlimited, plenary and paramount. This has been recognized by the courts in a long line of cases beginning with *Sturges* v. *Crowninshield,* 4 Wheat. 122. At page 192, Mr. Chief Justice Marshall said it was "unlimited and supreme." See also *In re Klein,* 1 How. 277; *In re Reiman,* 7 Ben. 455, 20 Fed. Cas. 11673; *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, 265; *New York* v. *Irving Trust Co.,* 288 U. S. 329, 333.

> "But, as between District Courts sitting in bankruptcy, and State Courts for the administration of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the Courts in which Congress shall vest this,

power paramount jurisdiction in bankruptcy proceedings."

Leidigh Carriage Company v. *Stengal,* 95 Fed. 637.

In *Taubel, etc. Co.* v. *Fox,* 264 U. S. 426, 430, the Court said:

"Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. In matters relating to bankruptcy its power is paramount."

"If this objection were to be sustained, it would seriously embarrass the enforcement of the Bankruptcy Law, and make it subordinate to the State insolvency and assignment laws, wherever an insolvent debtor who had committed an act of bankruptcy had placed his assets in the hands of the assignee acting by State Law under the direction of the Probate Court. It is generally true that, as between courts of concurrent jurisdiction, the Court which first obtains possession of the res must retain possession of it until the res has been finally disposed of, and anyone else interested in the res must apply to that Court if he desires relief with respect to the property in the possession of that Court. But, as between District Courts sitting in bankruptcy and State Courts for the administration of insolvent estates, there is no concurrent jurisdiction. The Constitution of the United States, by giving to Congress the power to pass uniform bankruptcy laws, gives to the Courts in which Congress shall vest this power paramount jurisdiction in bankruptcy proceedings." (Mr. Chief Justice Taft, then a judge of the Circuit Court of Appeals of the Sixth Circuit, in *Leidigh Carriage Company* v. *Stengel,* 95 Fed. 637.)

Isaacs v. *Hobbs, etc., Co.,* 282 U. S. 734.

In considering the present Frazier-Lemke Act it was said, in *United States National Bank* v. *Pamp,* 83 F. (2d) 493 (C. C. A. 8th, 1936):

"Recognizing the paramount power of Congress to enact bankruptcy legislation we hold that prior juris-

diction of the property and even the entry of a decree of foreclosure, would not prevent Congress from enacting bankruptcy legislation which would subject the property to the exclusive control and jurisdiction of the bankruptcy court."

The Federal Bankruptcy Act suspends or supersedes any conflicting state statutes. This is entirely consistent with Article VI of the United States Constitution:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

The Frazier-Lemke Act is a Uniform Law on the Subject of Bankruptcies.

It has been occasionally argued that the Frazier-Lemke Act is not a uniform law on the subject of bankruptcies as required by the Constitution. It seems well settled by this time that the uniformity required is geographical uniformity. The Act certainly is not vulnerable to attack on the ground that it applies only to farmers and to agricultural property.

In *Leidigh Carriage Co.* v. *Stengal*, 95 Fed. 637, 647, Judge Taft said:

> "In our judgment, the power given to Congress in section 8 of Article I, 'to establish uniform laws on the subject of bankruptcies throughout the United States' imposes no limitation upon Congress as to the classification of persons who are to be affected by such laws provided only the laws shall have uniform operation throughout the United States."

The argument against the Frazier-Lemke Act is based on paragraph (6) of the Act.

> "(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

It is claimed that the operation of this section may result in the Frazier-Lemke Act being in force in one jurisdiction while it is not in force in another jurisdiction because of a judge having declared the emergency to have ceased in his locality.

The courts, however, have held that an act is not lacking in uniformity because it recognizes diverse exemption laws in various states. 1 Remington, Bankruptcy (1934) par. 5.

The uniformity required is that the same act be enacted as applicable to all the United States. The fact that its effect varies in different states because of local law or conditions is not material. *Hanover National Bank* v. *Moyses*, 186 U. S. 181; *Leidigh Carriage Co.* v. *Stengel, supra.*

> "Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the States." *Stellwagen* v. *Clum*, 245 U. S. 605, 612.

In respect to uniformity the power given to a judge to declare the emergency no longer existing in his locality

should not be regarded as substantially different from varying state laws relating to exemptions, dower, etc.

> "We * * * hold that the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each state whatever would have been available to the creditors if the Bankrupt Law had not been passed. The general operation of the law is uniform although it may result in different particulars in different states." *In re Deckert,* 2 Hughes 183, Fed. Cas. No. 3728.

It is submitted that the Frazier-Lemke Act substantially complies with the above test.

Even Though Clause (6) of the Frazier-Lemke Act is Held Unconstitutional it Can be Severed from the Rest of the Act.

While we maintain that there can be no question as to the constitutionality of clause (6) of the Frazier-Lemke Act on the grounds that it prevents the Act from being uniform, should the Court find said clause invalid it can sever this clause from the rest of the Act.

Where part of an act is found unconstitutional, the provisions of that part may be disregarded, while full force and effect is given to those parts not repugnant to the Constitution. *Bank of Hamilton* v. *Dudley,* 2 Pet. 492; *Florida C. R. Co.* v. *Schutte,* 103 U. S. 118; *Poindexter* v. *Greenhow,* 114 U. S. 270; *Baldwin* v. *Franks,* 120 U. S. 678; *Eilenbecker* v. *Dist. Ct.,* 134 U. S. 31; *Pollock* v. *Farmers' Loan and Trust Co.,* 158 U. S. 601; *Dorchy* v. *Kansas,* 264 U. S. 286.

When the Court can clearly see that it would be the intent of the legislature to have the valid part of a statute stand even though a section is invalid, the invalid section may be separated from the rest of the act. *Pollock* v. *Farmers' Loan and Trust Co.,* 158 U. S. 601.

The essential element seems to be a clear indication of legislative intent that the invalid section should not invalidate the whole Act, and the ability of the valid part to stand and have effect separate from the invalid part. *Dorchy* v. *Kansas*, 264 U. S. 286.

Such an intent of the legislature is clear in this case. The clause in question was enacted merely as a possible aid to constitutionality. It is not present in the first Frazier-Lemke Act. It is modeled on a similar clause in the Minnesota Moratorium Act considered by this Court in *Home Building and Loan Ass'n* v. *Blaisdell*, 290 U. S. 298.

We submit that according to the above decisions clause (6) of Subsection (s) of Section 75 of the Bankruptcy Act is territorially uniform, but if the Court should disagree with our contention then we have no objection to it holding clause (6) void. This clause was put into the Act after considerable debate before the Senate Judicial Committee of the Whole and was put in in order to comply, as that Committee thought, with some of the suggestions made by this court in the *Blaisdell* case. This section does not affect any part of the rest of the act and certainly can be held void without affecting the constitutionality of the act.

Consideration of Cases Holding Frazier-Lemke Act Unconstitutional.

The leading cases except for the present case opposed to the validity of the Frazier-Lemke Act are *LaFayette Life Insurance Co.* v. *Lowmon*, 79 F. (2d) 887, and *United States National Bank of Omaha* v. *Pamp*, 83 F. (2d) 493.

Lowmon Case.

In the *Lowmon* case the Circuit Court of Appeals of the 7th Circuit held the new Frazier-Lemke Act unconstitutional. But we submit that the decision is erroneous. *The*

fact is that in that case the Court misconceived its authority and power under the Act and held the Act unconstitutional because of something that is not in the law. In that case the bankrupt had filed his petition under Subsection (s) of the original Frazier-Lemke Act. During the interval that this Court held that Act unconstitutional and the enactment of the new Act, *the petitioner's right of redemption* had expired. Consequently the petitioner had no further legal title or interest in the property and the Court should have decided that case by a proper construction of the Act rather than holding it unconstitutional. (See *In re Allison,* Eastern District of Illinois, decided February 25, 1935, Page 1918 Commerce Clearing House Bankruptcy Law Service, in which District Judge Wham refused to follow the decision of the Circuit Court in the *Lowmon* case on the grounds stated above.)

The Circuit Court of Appeals of the 7th Circuit in its opinion conceded that the new Act complies with three of the five so-called property rights recognized in the law of Kentucky in the *Radford* case. That is, right Nos. 1, 2 and 4 on page 17 of the opinion, but erroneously contends that the new Act does not comply with right Nos. 3 and 5.

In the first place let us suggest that the Court erred in assuming that this Court held the original Frazier-Lemke Act unconstitutional for any one or more of these so-called Kentucky rights. *The Court does not so state in its final conclusion.* All that the Court finally decided in the *Radford* case was that the Act was void because it contravenes the 5th Amendment.

In referring to the basis of the Blaisdell decision the Circuit Court said in the Lowmon decision:

> "It was rather in the nature of the police power which states alone may exercise and which the United States has never had." (Citing *Hamilton* v. *Kentucky Distilleries,* 251 U. S. 156.) "Therefore, if the federal

statute here in question cannot be upheld under the Bankruptcy power, it is invalid."

We believe that the police power of the Federal Government within its delegated powers, among them the bankruptcy power, is fully recognized.

Pamp Case.

In the *Pamp* case the Circuit Court of Appeals of the 8th Circuit follows very largely the erroneous reasoning of the *Lowmon* case. It quotes that decision with approval. In the *Pamp* case the court erroneously construes and misinterpretates and, in fact, misreads Subsection (s) of Section 75 of the Bankruptcy Act. Everything that the court says in favor of its decision holding Subsection (s) unconstitutional, could be said with equal force and more against Section 77 and 77B.

The learned Judge writing the opinion in the *Pamp* case seems to have forgotten that he was construing an Act of Congress passed under a grant of power under the Bankruptcy clause of the Constitution. He attempts to make a distinction between the Federal statute and the State statute in the *Blaisdell* case, but fails utterly to state a single difference, except his own erroneous conclusion, as to what Subsection (s) means. We respectfully ask this Court to read Subsection (s) and then the opinion in the *Blaisdell* case and we think that it will agree with us that the facts as stated and the conclusions drawn in the *Pamp* case are unwarranted, both as to facts and conclusions of law based thereon.

For instance, the Court in the Pamp opinion complains because under the new Frazier-Lemke Act the tax and upkeep on the property are paid first out of the rental. That is exactly the same as in the *Blaisdell* case which was upheld by this Court. If a State can pass that kind of a statute without a Federal grant, in face of the contract clause

in the Federal Constitution, then surely the Federal Government can pass a similar Act under the grant of power in the Bankruptcy clause.

We have already shown that the decision in the *Lowmon* case was not necessary under the facts, nor based upon sound conclusions of law. The *Pamp* case is largely based upon the *Lowmon* case. Both of these decisions misconceive and misconstrue the new Frazier-Lemke Act. The arguments made in both of these cases could have been made with equal force and were made when the Bankruptcy Act was originally passed years ago.

In discussing the doctrine of the *Blaisdell* case the Court said:

> "The power of the state to enact such legislation was found to rest on the police power reserved to the states. *Such police power,* however, *does not rest in the Federal Government.*"

The Court then cites the *Lowmon* case and *Hamilton* v. *Kentucky Distilleries* as authority for this conclusion that the Federal Government has no police power.

A criticism of the Lowmon decision which appeared in 30 Illinois Law Review, 795, February, 1936 is equally applicable to the Pamp decision. This criticism said:

> "There is some indication that the court may have confused the issue of power under the bankruptcy clause with that of due process * * * The new act has modified the 'scaling down' features of the earlier law, has recognized the creditor's right to realize upon his security by judicial sale, and has patterned the moratoria provisions after the state statute approved by the Supreme Court in the *Blaisdell* case. It would seem that if there is power in Congress to regulate the relationship after final decree, the present act satisfies the due process requirement of reasonableness with respect to the disposition of the creditor's rights. Certainly the rights of the mortgagee are no more ad-

versely affected than the corresponding rights of bondholders under Section 77, which the Supreme Court has held to be a constitutional exercise of the bankruptcy power."

The opinion, both in the *Lowmon* case and in the *Pamp* case, is based upon an erroneous interpretation of Subsection (s) of Section 75 and of the decision of this Court in the *Radford* case. It seems that the Court of Appeals in both of these cases assumes that state laws, state decisions and state procedure and remedies are the supreme law of the land rather than an act passed by Congress under a constitutional grant of power. In order to arrive at the erroneous conclusion, the Court, in both of these cases, disposes of the *Blaisdell* case on the grounds of state police power and then erroneously assumes that the Federal Government has no such power.

The Court in both of these cases seems to forget that when necessary, *to exert the police power in the exercise of a delegated power, the police power of the federal government, as to the delegated power, is plenary.* We have heretofore discussed the police power of the federal government and shall not repeat it here.

The Decision Below.

In this case the Circuit Court of Appeals below abandoned its splendid and logical reasoning in the case of *Bradford* v. *Fahey,* 76 F. (2d) 628. It did this because it misinterpreted this Court's opinion in the *Radford* case, 295 U. S. 555.

The Circuit Court of the Fourth Circuit in the case at bar, the same as the Circuit Court of the Eighth Circuit in the *Pamp* case, 83 F. (2d) 493, and the same as the Circuit Court of the Seventh Circuit in the *Lowmon* case, 79 F. (2d) 887, assumes that the *Radford* case holds that State laws, State remedies, and State procedure, are superior to

or supercede Federal laws enacted by Congress under a grant of power under the Constitution. We submit such is not the holding in the *Radford* case. Such is not the law, but the reverse is the law. Acts of Congress enacted under the Constitution supercede State laws, remedies and procedure, and supercede even State constitutions and State decisions that are in conflict therewith.

In construing section 75 of the Bankruptcy Act of 1898, including subsection (s), the new Frazier-Lemke amendment, *the courts must be guided by the language of the Act, and not by the over-zealous statements of counsel, who read something into the Act that is not there.* As an Act of Congress, it is entitled to the greatest respect and the most careful and painstaking consideration by this Court. *It is presumed to be constitutional. The burden of proof rests upon those assailing its constitutionality. If the Act is susceptible of two constructions, one constitutional and the other unconstitutional, then it is the duty of the Court to hold it constitutional.*

This Act must not be confused with State acts. It is an Act passed by the Congress of the United States on the subject of bankruptcy—passed under the grant of power given it by the Federal Constitution. "Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcy throughout the United States", and "to make all laws which will be necessary and proper for carrying into execution the foregoing powers, and all other powers, vested by this Constitution in the Government of the United States, or in any department or officer thereof." (U. S. Constitution, Art. I, par. 8.) Again,

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in*

the Constitution or laws of any State to the contrary notwithstanding'' Article VI.

On the subject of bankruptcy, *the Constitution vests full and complete, not only partial, legislative power in Congress. Any State law must give way to the national law. That is the mandate of the Constitution.* There is no limitation on this power, save and except such as may be found in the Fifth Amendment. "No person shall * * * be deprived of life, liberty or property without due process of law." It is conceded by all that a person may be deprived of his life, liberty or property by due process. The question is: What is "without due process"? No final definition of this has, or perhaps ever will be, given. Generally the courts have, in effect, held that the Act must not be so unwarranted, arbitrary, and unreasonable as to shock one's conscience. (*Hanover National Bank* v. *Moyses,* 186 U. S. 181; *State* v. *Superior Court of King County,* 45 L. R. A. 177; *Sturges* v. *Crowninshield,* 4 Wheat. 122.)

The Hon. Judge Parker, who wrote the opinion in the case at bar, also wrote the opinion in the case of *Campbell* v. *Alleghany Corporation,* 79 F. (2d) 947. In that case the reasoning and the conclusions reached by the court in holding Section 77B of the Bankruptcy Act constitutional are diametrically opposite from the reasoning and conclusions reached in holding the new subsection (s) of Sec. 75 unconstitutional in the case at bar. In the *Campbell* case the Hon. Judge Parker states in his opinion:

> "We entertain no doubt as to the constitutionality of the statute. It is an exercise of the power conferred on Congress by Art. I, Sec. 8, Clause 4 of the Constitution, 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States', adapted to the conditions presented by modern industrial organization. Prior to the passage of the act, neither proceedings under the old bankruptcy laws nor receiverships in equity furnished adequate relief for dis-

tressed corporate debtors, their creditors and stockholders, under modern conditions. * * * Proceedings under the old bankruptcy laws were inadequate because no machinery existed to scale down secured debts without a sale of the security; and a sale almost necessarily resulted in a sacrifice of the property at an inadequate price because of the lack of persons in a position to bid for it. If forced to sale, it was frequently, if not generally, bought in by a committee of bondholders at the inadequate prices which forced sales notoriously yield, with the result that non-assenting bondholders received little and stockholders nothing at all. * * * Only by the further exercise of the bankruptcy power of Congress could adequate relief be afforded these distressed corporate debtors and their creditors; and the act in question was passed for the purpose of affording this relief."

* * * * * * *

"The grant of power to Congress to establish uniform laws on the subject of bankruptcies is not limited to the forms in which that power has heretofore been exercised by Congress or by the laws relating to bankruptcy which had been enacted in England or in the several American colonies prior to the adoption of the Constitution. See article by Prof. Gerdes in XII New York University Law Quarterly Review 198, and article by Jacob J. Kaplan, vol. XXI American Bar Association Journal p. 47, for a history of these acts. All phases of the relationship between a debtor financially embarrassed and his creditors is brought under the control of Congress by the constitutional grant of power; and the fact that a particular mode has hitherto been employed in dealing with this relationship is not to be taken as a measure of the power over it. *Hanover Nat. Bank* v. *Moyses,* 186 U. S. 181; *Sturges* v. *Crowninshield,* 4 Wheat. 122; *In re Landquist* (C. C. A. 7th) 70 Fed. (2d) 929; *In re Klein,* Fed. Cas. No. 7865 reported as note to *Nelson* v. *Carland,* 1 How. 265, 277; *In re Reiman,* 7 Ben. 455, Fed. Cas. No. 11,673; *Kunzler* v. *Kohaus,* 5 Hill 317. As said in Story on the Con-

stitution, Sec. 1113, quoted in *In re Reiman, supra:* 'Perhaps as satisfactory a description of a bankrupt law as can be framed is that it is a law for the benefit and relief of creditors and their debtors in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provision for cases of persons failing to pay their debts.'

And, as pointed out by the Circuit Court of Appeals of the Seventh Circuit in *In re Landquist, supra,* inability to pay (except under the act of 1867) has always been recognized in this country as entitling a debtor to the benefit of the bankruptcy acts 'whether that inability were caused by a lack of assets or a lack of liquidity of assets.' Certainly, the act here in question is for the relief of corporate debtors who are unable to pay and their creditors, and falls well within the purpose of the constitutional grant of power.''

* * * * * * *

''Little need be said as to the question which arises under the Fifth Amendment. There is no question, of course, but that the exercise of the bankruptcy power by Congress, as is the case with other delegated powers, is subject to the requirement of due process contained in that amendment. *Monongahela Nav. Co.* v. *U. S.,* 148 U. S. 312, 336; *Hanover Nat. Bank* v. *Moyses, supra,* 186 U. S. 181, 192. But as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not to be taken as in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law.' *Hanover Nat. Bank* v. *Moyses, supra.* We do not think that the requirement that secured creditors scale their debts in accordance with a plan which two-thirds of them are willing to accept and which has been approved by the court as reasonable and fair, and accept in lieu of payment in money such securities as are specified in the plan, can be said to be such an arbitrary and unreasonable exercise of

the bankruptcy power as to amount to a denial of due process.

"The fact that secured debts are affected by the act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the Constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt, * * * and the Constitution expressly permits and grants to Congress the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to the subject of bankruptcies.' *In re Burgh*, 7 Fed. Supp. 184, 185.

"As a matter of fact, no property in any real sense is taken from the dissenting creditor when he is compelled under 77b to scale his claim and accept securities in lieu thereof. The securities held by him have already shrunk in value before the proceeding under the act is instituted; and all that is required of him is that he face reality and accept his pro rata interest in the debtor's property in a form which will not jeopardize the rights of other creditors similarly situated. * * * and, when the situation is viewed realistically, it is readily seen that he is not required to surrender any part of the value either of his securities or of the property available for the payment of his claim."

* * * * * * *

"Doubts as to the validity of Section 77b are based very largely upon the fact that the relief which it provides for embarrassed corporations, their creditors and stockholders, has not heretofore existed under the laws of this country, and for that reason seems novel and questionable. It must be remembered, however, that the power granted Congress over the subject of bankruptcies is plenary, and that in its exercise Congress is not limited by what has been attempted in the past but may shape its remedies in a way to meet adequately the problems of the present. Like other constitutional grants of power, that giving Congress power over bankruptcies is to be interpreted, not in the light of the

conditions with which the framers of the Constitution were familiar, but of what is required under modern conditions to deal adequately with the relationship existing between embarrassed debtors and their creditors. As said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 442, 'If by the statement that what the Constitution meant at the time of its adoption it means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—"We must never forget that it is a constitution we are expounding" (*McCulloch* v. *Maryland,* 4 Wheat. 316, 407)—"a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Id., p. 415. When we are dealing with the words of the Constitution, said this Court in *Missouri* v. *Holland,* 252 U. S. 416, 433, "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. * * * The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago".' "

We believe that the Circuit Court's reasoning and conclusions in the *Campbell* case are correct and that its reasoning and conclusions in the case at bar are erroneous. We arrive at this conclusion because this Court, after its decision in the *Radford* case, holding the original Subsection s of Section 75 of the Bankruptcy Act unconstitutional, denied, on October 15, 1935, a writ of certiorari in the Campbell case. This we feel was equivalent to confirming the decision of the Circuit Court holding Section 77B constitutional, and is in line with this Court's decision in hold-

ing Section 77 of the Bankruptcy Act constitutional in the *Rock Island* case.

As is shown by the decisions in the *Rock Island* case and in the *Campbell* case, a secured creditor's rights are no more sacred, under the constitution, than an unsecured creditor's. The encumbered property does not belong to the mortgagee, but to the mortgagor. The mortgagee is not entitled to the property, but to its value. That is the long settled law in this country. Any legislation that provides for a judicial determination of the value of the property is and always has been valid. *Conard* v. *Atlantic Inc. Co.*, 1 Pet. 386, 7 U. S. (L. Ed.) 189, 19 R. C. L. 310.

Conclusions.

This is a case in bankruptcy. The legislation in question is legislation on the subject of bankruptcy. The only farmer who can take advantage of this Act is a bankrupt farmer. A bankrupt is a financial wreck. The question of interest and profits in bankruptcy proceedings is generally out of the question. The question is one of salvaging, saving what can be saved out of the wreck. In legislating on this subject, it is just as much the duty of Congress to consider the unfortunate debtor, as to consider the unfortunate creditor.

This Act effects bankrupt farmers as defined by Section 75 of the Bankruptcy Act. *It does not apply to corporations or to absentee landlords.* The truth is that the absentee landlords are largely insurance companies, banks, mortgage investment corporations and money lenders. These cannot take advantage of this Act, but as creditors their rights are fully protected. * * * *"The rights of debtor and creditor equally entered into the mind of the framers of the Constitution." In re Klein,* 1 Howard 279.

It is true that some of the creditors will not be able to collect the face value of their mortgages or the accrued in-

terest thereon. *But that is a loss they have already sustained, not through the operation of the statute,* but through the default, in solvency and bankruptcy of their debtors. This is equally true under other sections of the Bankruptcy Act and especially true under Sections 77 and 77B.

We are aware that some courts have erroneously attempted to distinguish Sections 77 and 77B of the Bankruptcy Act from the new Subsection (s) of Section 75. There can be and is no logical distinction except that Sections 77 and 77B are far more drastic than Section 75, including the new Subsection (s). The only distinction that can be made is that Sections 77 and 77B deal with insolvent railroads and corporations and Section 75 has for its object the saving of several thousand farm homes.

The attempted distinction, that under Sections 77 and 77B a majority or two-thirds of the creditors must agree, is no logical or constitutional distinction and in fact is not a correct statement of the provisions of Sections 77 and 77B. *Under those sections a reorganization can be had with a majority of the secured creditors dissenting,* provided their securities are kept intact or other reasonable provisions made to assure to them the value of their securities.

Let us get the facts straight in relation to these three Sections of the Bankruptcy Act and then we are sure that Section 75, including Subsection (s), is as constitutional as Sections 77 and 77B. What Congress can do to one-third or a majority, under the Constitution, it can do to all of the creditors. At any rate the Constitution is supposed to protect minorities and not majorities.

For the courts to hold Sections 77 and 77B of the Bankruptcy Act constitutional and then hold Subsection (s) of Section 75 unconstitutional is inconsistent. Under Sections 77 and 77B, the mortgagee's lien can be altered and changed entirely, and he can be forced to substitute in lieu of his

bonds or mortgages, bonds or stock in the same or in other corporations, or in a merger of corporations. These bonds and stocks may bear interest and may not. They may ultimately prove worthless.

The fact that two-thirds of the creditors may agree to it is not an argument in favor of its constitutionality. This is simply evidence that the reorganization is just and reasonable, upon which evidence the Court may, in its discretion, confirm or disallow the reorganization. Under the new Frazier-Lemke Act, the liens continue in full force and effect, until the property has been converted into money, and then the lien is transferred to the funds, up to the full value of the property. We submit that that is far more reasonable, and less drastic, than the provisions of Sections 77 and 77B.

Under Sections 77, 77B and 75 of the Bankruptcy Act, all contracts and obligations are merged. The court assumes full and complete jurisdiction of all of the bankrupt's property, secured or unsecured. Congress and not the court is the sole judge as to the methods and means by which the constitutional grant of power, to legislate upon the subject of bankruptcy, is to be carried out. This is proper because Congress is not restricted or limited, as are courts, to rules of evidence in ascertaining facts. It has a far wider latitude in the collection and finding of facts than the courts and for that reason courts have always upheld the acts of Congress unless they are unreasonable and unwarranted and in violation of the Constitution. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Fairbanks* v. *U. S.*, 181 U. S. 283.

The amendments, the new Subsection (s), Sections 75, 77 and 77B of the Bankruptcy Act, mark a new epoch. From now on, in the interest of the public, property and wealth will be conserved in the hands of those who created it—not destroyed. The debtor will be considered as well as the creditor. The bankruptcy act is going to become an act of conservation and not an act of wreckage.

The new Frazier-Lemke Amendment to the Bankruptcy Act does not take any property from the creditors. It gives to the creditors all of the past efforts, earnings and accumulations of the debtor, his wife and his children, but it does at the same time prevent them from taking the earnings and accumulations of the debtor, his wife and his children. It deprives the creditors of nothing, but does prevent them from destroying all value by throwing more farm land and farm property upon the market and it conserves the home and property for those who created and accumulated it, subject to existing liens up to the par value as judicially determined under the provisions of the Act.

This amendment is a conservation act. Nobody loses anything—it conserves property and values. The creditors will get the present value of the property—that is all they could get before this amendment was enacted or that they are entitled to. In fact they will get more under this amendment than they ever would get by wrecking another million farm homes and destroying all values. The agricultural wealth of this nation can and will be preserved in the hands of those who created it—the farmers.

We repeat, that if Section 77 is constitutional, and the Supreme Court has held that constitutional in the case of *The Chicago, Rock Island and Pacific Railway Company*, 294 U. S. 648, then Section 75 is constitutional. If the Court will read that decision it will find that the provisions of Section 77 are far more drastic than Section 75, including the present amendment and yet the Supreme Court of the United States held that to be constitutional. We also again refer the Court to the splendid decision in the *Campbell* v. *Allegany Corporation* case. In that case the Circuit Court of Appeals of the 4th Circuit sustained the constitutionality of Section 77b and a petition for certiorari was denied this court.

The courts should not read limitations into the Constitution that do not exist. They should avoid judicial legislation, and leave Congress free to act within the constitutional grant of power. Our Constitution is a masterpiece of fundamental legislation. It was framed by our Revolutionary forefathers—the pioneers of America—able, intelligent, honorable men, who had no intention to legislate for all the future of the nation. They put nothing into that instrument that hampers and prevents progress. They made it elastic. They realized that nothing was permanent, that the nation would grow; therefore they limited the Constitution to general principles of government. They had no intention of putting hobble-skirts on Congress, and hindering progress. Their wisdom in limiting the Constitution to fundamental principles of government is clearly shown, when we realize that they lived in a different age; that they never talked on a telephone; never saw a steamboat; never rode in a train or in an automobile; never thought of an aeroplane, and never listened to a radio, nor ever dreamed of such things. Their wisdom was shown when they made the Constitution elastic—a Constitution that had within it the possibilities of the future development and growth of the nation, and its people. The Constitution was made for the people, and not the people for the Constitution.

The power of the executive, the judicial and the legislative branches of government are all derived from that same Constitution, and each of these three coordinate branches of our government must respect the power of the other, under the Constitution. "Finally, the power of this Court is not to amend, but only to expound the Constitution, as an agency of the sovereign people who made it, and who alone have authority to alter or unmake it."

As was so aptly stated by Chief Justice Hughes, in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 443:

"It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable words: 'We must never forget that it is a constitution we are expounding.' "

Respectfully submitted,

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APPENDIX A.

The New Subsection (s) of Section 75 of the Bankruptcy Act.

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this Act. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal.

"(1) After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing

mortgages, liens, pledges, or encumbrances. All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear.

"(2) When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semiannually for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the amount and kind of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property. Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors, and applied on their claims, as their interests may appear. The court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, may order sold any unexempt perishable property of the debtor, or any unexempt personal property not reasonably necessary for the farming operations of the debtor, such sale to be had at private or public sale, and may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured or unsecured creditors, as their interest may appear, in accordance with the provisions of this Act, and may require such payments to be made quarterly, semiannually, or annually, not inconsistent with the protection of the rights of the creditors and the debtor's ability to pay, with a view to his financial rehabilitation.

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.

"(4) The conciliation commissioner, appointed under subsection (a) of section 75 of this Act, as amended, shall continue to act, and act as referee, when the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of this Act, and continue so to act until the case has been finally disposed of. The conciliation commissioner, as such referee, shall receive such an additional fee for his services as may be allowed by the court, not to exceed $35 in any case, to be paid out of the bankrupt's estate. No additional fees or costs of administration or supervision of any kind

shall be charged to the farmer debtor when or after he amends his petition or answer, asking to be adjudged a bankrupt, under subsection (s) of section 75 of this Act, but all such additional filing fees or costs of administration or supervision shall be charged against the bankrupt's estate. Conciliation commissioners and referees appointed under section 75 of this Act shall be entitled to transmit in the mails, free of postage, under cover of a penalty envelope, all matters which relate exclusively to the business of the courts, including notices to creditors. If, at the time that the farmer debtor amends his petition or answer, asking to be adjudged a bankrupt, a receiver is in charge of any of his property, such receiver shall be divested of possession, and the property returned to the possession of such farmer, under the provisions of this Act. The provisions of this Act shall be held to apply also to partnerships, common, entirety, joint, community ownerships, or to farming corporations where at least 75 per centum of the stock is owned by actual farmers, and any such parties may join in one petition.

"(5) This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges. Any farm debtor who has filed under the General Bankruptcy Act may take advantage of this section upon written request to the court; and a previous discharge of the debtor under any other section of this Act shall not be grounds for denying him the benefits of this section.

"(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.

Approved, August 28, 1935.